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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TIMOTHY POTTS, Defendant and Appellant.	B290757 (Los Angeles County Super. Ct. No. YA094029)

APPEAL from a judgment of the Superior Court of Los Angeles County. Scott T. Millington, Judge. Affirmed in part and remanded with directions.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

In a second amended information filed by the Los Angeles County District Attorney's Office, defendant and appellant Timothy Potts (defendant) was charged with one count of inflicting corporal injury upon a person with whom he had a "dating relationship" following a prior domestic violence conviction (Pen. Code, § 273.5, subd. (f)(2); count 1),[1] one count of criminal threats (§ 422, subd. (a); count 2), one count of dissuading a witness from reporting a crime (§ 136.1, subd. (b)(1); count 3), and six counts of attempting to dissuade a witness (§ 136.1, subd. (a)(2); counts 4–9). It was further alleged that defendant had two prior "strike" convictions within the meaning of the "Three Strikes" law (§§ 667, subd. (d), 1170.12, subd. (b)), as well as two serious felony convictions (§ 667, subd. (a)(1)) and five prior prison terms (§ 667.5, subd. (b)).

A jury convicted defendant of counts 1 and 4 through 9 and acquitted him of counts 2 and 3. In a bifurcated proceeding, the trial court found the alleged priors to be true.

The trial court partially granted defendant's *Romero*[2] motion, striking one prior conviction as to counts 5 through 9 but denying the motion as to count 4. Defendant was sentenced to a total term of 43 years eight months to life in prison, comprised of 35 years to life on count 4, including two five-year serious felony enhancements pursuant to section 667, subdivision (a)(1); two years on count 1; and 16 months each on counts 5 through 9.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

In this timely appeal, defendant argues that the trial court erred by permitting the introduction of a witness's prior testimony where the prosecution failed to demonstrate due diligence in securing that witness's presence at trial; there was insufficient evidence to support his conviction on count 1 and the true finding on one prior conviction; and, pursuant to Senate Bill No. 1393 (SB 1393), the matter must be remanded for the trial court to exercise its new discretion to strike one or both of the previously mandatory five-year serious felony enhancements.

We remand for resentencing so that the trial court may exercise its new discretion to consider striking one or both serious felony enhancements. We affirm the judgment in all other respects.

BACKGROUND

I. The People's Evidence

A. *The February 13, 2016 incident*

1. Ford's testimony[3]

M. Ford (Ford) testified that defendant was her ex-boyfriend. They dated for "[a]bout a few months[,]" starting in December 2015, but did not live or have children together.

On February 13, 2016, at approximately 8:25 p.m., an altercation erupted between defendant and Ford at Ford's home. Although defendant "wasn't allowed at [Ford's] house" because he had previously stolen money from her, "he . . . barg[ed] through to

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[3] As discussed below, the trial court found that Ford was unavailable to testify at the trial and that the prosecution had made reasonable efforts to secure her presence. The court therefore admitted Ford's testimony from the November 17, 2016 preliminary hearing, over defendant's objection. The transcript of Ford's preliminary hearing testimony was read to the jury.

get in the door." Ford ran to her bedroom from the living room, followed by defendant. Ford tried to call 911, but defendant "smacked" or "knocked" the phone out of her hand.

Defendant began to attack Ford. He pushed Ford onto her bed and restrained her by pinning her down with his hands. Defendant punched Ford in the face multiple times, causing injuries to her lip and forehead. Ford "[l]ike . . . just blacked out, and . . . grabbed [her] mace and maced [defendant]." Defendant told Ford, "'Oh, bitch, I'm gonna kill you now.'"

Tierra Daniels (Daniels), the mother of Ford's brother's child, was present and called the police. Defendant left.

2. The 911 call

Audio of Daniels's 911 call was played for the jury.[4] On the call, Daniels described the incident as "domestic violence[,]" involving "[a] boyfriend." She told the dispatcher, "I'm calling for a friend. They were fighting and you guys need to get here."

3. Deputy Patino's testimony

Deputy Sandra Patino of the Los Angeles County Sheriff's Department responded to Ford's home with her partner. Ford "seemed pretty scared, kind of shaking[,]" and Deputy Patino "could see bleeding on her lips from the lacerations." Ford, however, refused medical attention. Ford did not tell Deputy Patino that defendant knocked the phone out of her hand or threatened to kill her, or that she had lost consciousness.

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[4] The trial court admitted the 911 call as a nontestimonial, spontaneous statement. The watch deputy in charge of the Los Angeles County Sheriff's Department's 911 dispatch authenticated the recording.

Deputy Patino took photographs of Ford, depicting how she appeared on the night of February 13, 2016, with swelling on the left side of her forehead, lacerations on her upper and lower lips, and blood stains on her shirt.

B. *Attempts to dissuade Ford from testifying*

1. Recorded phone calls

The prosecution played portions of recordings of eight phone calls from defendant while he was in jail in late April and early May 2016, prior to his first preliminary hearing originally scheduled for May 11, 2016. A field service manager for Global Tel Link explained how inmates at Los Angeles County jails make phone calls, and authenticated the audio files played as being associated with defendant.

i. The *April 27, 2016 call*

In a call made on April 27, 2016, defendant said to an unknown female, "I got a fucking, a warrant, I mean a felony for fucking domestic battery? . . . I've been doing my investigation on the bitch. I just talked to some homies from Inglewood Family. They know the bitch." He continued, "I'm like you think the bitch going to come to court? They like no, I don't think she's going to come to court, but it's still the bitch name is on black and white [unintelligible]."

Defendant described Ford, including her skin tone, name ("Manika . . . or Malika Ford"), nickname, and the number of children she had. Defendant provided what he believed was Ford's address[5] and stated, "You seen the spot. You'll know when you pull, if you pull up, you'll know, you'll know exactly which one it is because you've seen me pull up over there before."

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[5] Defendant provided the correct street name, but the house number was incorrect.

ii. *The April 28, 2016 call*

During a call on April 28, 2016, defendant told an unknown female to "[c]ome see me and get my phone so you can get in contact with that bitch, man. Tell that bitch don't come to court in 60 days after trial, . . . and I need to be out of here before Sunday, to be truthfully fucking honest with you. So I'm going to handle my counter with that shit."

iii. *The April 30, 2016 call*

On April 30, 2016, defendant tried to have an unknown female initiate a three-way call to Ford's phone number. Defendant stated, "I'm trying to get the bitch number so you can call the bitch on the three-way, so I can talk to the bitch, see if the bitch going to come to my fucking court." He told the unknown female, "I can't risk calling her and having you call her straight through. I can't risk that shit because the fucking restraining order says I can't, I can't contact the bitch in no kind of way, no how, third party, three-way, none of that shit."

iv. *The May 1, 2016 calls*

The jury heard three calls made on May 1, 2016. In one, defendant told the person on the other end of the line that "I'm trying to figure out a way—come up with a way, man, to get this bitch to not come to court, man. I need your help on this. I need to figure out, what the fuck can we do?" He stated that he could provide "the bitch address" and "the bitch phone number[,] . . . [b]ut I can't really call the bitch. I just can't afford for nobody to go around there and go hard on the bitch, because if they do, the bitch is going to come to court."

In another call defendant stated, "I sic my baby momma on her. . . [S]o let them bitches kill each other or do what the fuck they're going to do with each other. Or . . . use my son as bait, to

talk . . . to talk the bitch into not coming to court, okay? My plan . . . is to get the fuck out of here, man."

In another call, an unidentified person warned defendant, "I don't think that's a good idea for you to talk to old girl. Because if you tell her not to come to court, that's coercion of a witness[.]" Defendant responded, "I understand all that. I'm not going to call and talk to her. I'm going to have somebody do it[.]" He further explained, "they don't have no way of connecting me with the person who's calling . . . [.] They don't—she don't know who my people is like that."

v. *The May 4, 2016 call*

In a call made on May 4, 2016, defendant asked an unidentified person to call Ford's phone number and initiate a three-way call. When no one answered the phone, defendant asked the person to try Ford's number but at a different area code. Defendant said, "I ain't supposed to be doing none of this. That's why I'm not trying to talk."

vi. *The May 5, 2016 call*

Finally, in a call made on May 5, 2016, defendant asked an unidentified person to check "my phone" for Ford's phone number. Defendant stated, "That bitch ain't answering that fucking phone, man. I guess the bitch know what time it is. That mean some fuck shit going on."

2. Ford's testimony

Recordings of the eight jail phone calls were played for Ford, and she testified that she recognized defendant's voice on each. She received a few phone calls from defendant or his relatives encouraging her not to go to court, as well as text messages from defendant's niece.

II. Defendant's Evidence[6]

A. *Defendant's testimony*

Defendant testified that he met Ford in December 2015 on Facebook and saw her about seven or eight times between then and February 2016. Defendant denied that he had a romantic, dating, or sexual relationship with Ford, instead describing their relationship as "more or less social." Defendant stated, "I'm guilty of indulging in social partaking in marijuana, and [Ford] was more or less somebody that, you know, I indulged in smoking marijuana with every now and then when I came to town. I was residing in Las Vegas at the time."

Defendant went to Ford's house on February 13, 2016, because Ford had called him several times that day "sound[ing] kind of distraught, upset" and telling defendant that she wanted to talk to him about something in person. Ford invited him inside. Defendant sat down and pulled out his marijuana paraphernalia.

Ford said that she needed money to pay her power bill, which defendant "kind of laughed . . . off" because she could not "be serious asking [him] for some money" given that they did not "have any kind of involvement with each other." Ford "got upset" and explained that it was "a serious situation[.]" She accused defendant or "someone that [he] deal[t] with" of calling the Department of Children and Family Services to her home. Defendant and Ford "had a small bout with each other verbally in regards to [defendant] denying that."

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[6] Defendant represented himself during most, but not all, of the trial.

As defendant tried to leave, Ford pulled out a can of pepper spray or mace and began to spray it. Defendant then "grabbed her by her wrists trying to gain control . . . and stop her from spraying." The spray got into defendant's eyes, causing a burning sensation and impaired vision. "[S]till trying to maintain control over the pepper spray[,]" defendant "[f]orcefully . . . ha[d] her wrists[.]" Defendant stepped forward, Ford stepped back onto an object low to the ground, and they both went down, pushed by defendant's momentum. Ford landed backwards, with defendant on top of her. Defendant "guess[ed] that that's when the injuries that [Ford] claimed happened took place." Defendant gained control of the pepper spray, got up, and left Ford's home. Defendant denied threatening Ford's life, punching her in the face, or knocking a phone out of her hand.

Defendant denied contacting Ford to try to get her to not come to court or instructing a third party to dissuade Ford. He admitted "making phone calls telling [third parties] that [he] wanted to see if [Ford] was go[ing to] come to court[,]" attempting a three-way call "wanting to see what [Ford's] mind set was" about appearing, and providing Ford's name and address to a third party for the same reason. Defendant acknowledged that the recorded phone calls indicated that he was "at least thinking about the fact that [he] didn't want . . . Ford to come into court[,]" but that he did not "act on that thought at any point or in any way[.]"

B. *The private investigator's interview with Ford*

Johnny Swanson (Swanson), defendant's private investigator, testified that he interviewed Ford on June 27, 2016. Ford told Swanson that, when defendant "started putting his hands on" her and "pinned" her down, she sprayed him with

mace, after which defendant scratched her, "busted [her] lip[,]" and threatened to kill her. Ford told Swanson that she was able to get away from defendant, run into the bathroom, lock the door, and call the police.

When asked by Swanson how long she dated defendant, Ford responded that they had dated for "only a few months." Ford explained that they had met through Facebook: "[W]e had got acquainted and then when he came over, we was just, you know like cool or whatever and then we just, it wasn't like an official date because of his history and what he do."

C. *Detective Shaw's testimony*

Defendant called Detective Diana Shaw, of the Los Angeles County Sheriff's Department, as a witness. Detective Shaw interviewed Ford several days after the February 13, 2016 incident. Ford told Detective Shaw that defendant punched her four to five times, but that no one else was present during the incident. During this first interview, Ford did not say that defendant had threatened to kill her during the incident or knocked the phone out of her hand, preventing her from calling 911. Nor did Ford tell Detective Shaw that she and defendant "were in an intimate or sexual relationship[.]"

In a later interview during May 2016, Ford told Detective Shaw that her child had been present during the February 13, 2016 incident, as well as another person, and that defendant had threatened to kill her.

D. *Deputy Patino's testimony*

Defendant recalled Deputy Patino to testify. When Deputy Patino interviewed Ford on the night of the incident, Ford stated that defendant "was her boyfriend, and they had been dating for three months[,]" but that they did not live or have children

together. Ford told Deputy Patino that, in the lead up to the argument with defendant, Ford "confronted" defendant about stealing money.

DISCUSSION

I. The Trial Court Properly Admitted Ford's Preliminary Hearing Testimony.

A. *Relevant facts and proceedings*

1. The prosecution's efforts to locate Ford

Ford appeared in court on May 11, 2016—the date that defendant's preliminary hearing was originally scheduled to take place. She did not appear on October 3, 2016, however, and the trial court issued a body attachment at the prosecution's request. Ford came to the courthouse on October 24, 2016, and on November 17, 2016, appeared and testified at the preliminary hearing. The prosecutor maintained regular contact with Ford, speaking with her about the case status on December 6, 2016; February 2, 2017; and May 4, 2017. Ford did not appear on May 23, 2017, pursuant to a subpoena personally served on her earlier that month, and another body attachment issued.

The next scheduled court date was August 9, 2017, when the jury trial was set to begin. On August 7, 2017, the prosecutor called Ford and left a voice message. He also texted and e-mailed her. But Ford failed to appear on August 9, 2017, and the trial court issued another body attachment. Later that night, the prosecutor received an e-mail response from Ford providing a new telephone number, which he called, left a voice message for, and texted the following day. The prosecutor received a return text from the new number Ford had provided informing him that he had the wrong number. The prosecutor e-mailed Ford the next day, August 11, 2017, but did not receive a response.

On August 15, 2017, at approximately 9:50 a.m. and 2:00 p.m., a senior district attorney investigator attempted to serve Ford at the address where he had previously successfully served her with a subpoena in May 2017. No one responded when the investigator knocked at the door. A housing authority inspection notice with Ford's name on it was on the screen door. He spoke with the building manager, who recognized Ford's name and photograph and confirmed that she lived at that address.

The investigator returned to Ford's apartment on August 16, 2017, at approximately 7:00 a.m. and 2:30 p.m. Both times, he knocked on the door but received no response. He left a business card in the screen door during his afternoon attempt.

He returned to the apartment again the next day, August 17, 2017, at approximately 7:15 a.m. and 3:00 p.m. Again, there was no response to his knocks on the door, and he saw the business card that he had left the day before lying on the front porch. He also checked with the Los Angeles County Sheriff's Department regarding whether Ford was in custody and with the coroner's office, with negative results from both inquiries.

He went to Ford's apartment a final time at approximately 7:00 a.m. on August 18, 2017, but there was no response. He called Ford that morning and left a message.

2. Motion to introduce Ford's prior testimony

On August 18, 2017, the People moved to admit Ford's testimony from the November 17, 2016 preliminary hearing based on her unavailability to testify at defendant's trial. The trial court held a hearing on the motion that day, during which the district attorney investigator testified under oath and the

prosecutor made unsworn "representations as an officer of the court" regarding his communications with Ford.

As Ford was the "lone victim[,]" the trial court characterized Ford's testimony as "[o]bviously . . . very important." The court questioned why the investigator did not go to Ford's home at night instead of repeatedly going "when a person might be working" and had concerns regarding whether the prosecution used "[a]ll reasonable means" to secure Ford's attendance.

Notwithstanding these reservations, the trial court balanced relevant factors and concluded "that the prosecution ha[d] made reasonable efforts to secure [Ford's] attendance" and that she remained unavailable. Accordingly, the court admitted Ford's preliminary hearing testimony over defendant's objection.

B. *Relevant law and standard of review*

A criminal defendant's right to confront the witnesses against him is guaranteed under both the federal and state constitutions. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *People v. Herrera* (2010) 49 Cal.4th 613, 620 (*Herrera*).) The confrontation right, however, "is not absolute. If a witness is unavailable at trial and has given testimony at a previous court proceeding against the same defendant at which the defendant had the opportunity to cross-examine the witness, the previous testimony may be admitted at trial. In a criminal case, the prosecution bears the burden of showing that the witness is unavailable and, additionally, that it made a 'good-faith effort' [citation] or, equivalently, exercised reasonable or due diligence to obtain the witness's presence at trial. [Citations.]" (*People v. Sánchez* (2016) 63 Cal.4th 411, 440 (*Sánchez*).)

"[I]ncapable of a mechanical definition[,]" due diligence "connotes persevering application, untiring efforts in good earnest, efforts of a substantial character. [Citation.]" (*People v. Linder* (1971) 5 Cal.3d 342, 346–347.) Whether due diligence has been exercised is a case-specific inquiry. (See *id.* at p. 346.) "Relevant considerations include the timeliness of the search, the importance of the witness's testimony, and whether leads were competently explored. [Citation.]" (*Sánchez*, *supra*, 63 Cal.4th at p. 440.)

We "defer[] to the trial court's determination of the historical facts if supported by substantial evidence, but . . . review[] the trial court's ultimate finding of due diligence independently, not deferentially. [Citations.]" (*Sánchez*, *supra*, 63 Cal.4th at p. 440.)

C. *Analysis*

Reviewing the prosecution's efforts to secure Ford's presence at trial, we conclude that the People exercised due diligence and that the trial court properly admitted Ford's prior testimony.

Until August 7, 2017, the prosecutor believed that Ford was a cooperative witness. Despite defendant's attempts to dissuade her from testifying, Ford appeared in court in May 2016 when defendant's preliminary hearing was originally scheduled to take place. She appeared on October 24, 2016, as well as on November 17, 2016, when she testified at the preliminary hearing. Ford spoke to the prosecutor about the case on December 6, 2016; February 2, 2017; and May 4, 2017.

As trial approached, the prosecutor called, texted, and e-mailed Ford on August 7, 2017. He received a response to his e-mail two days later providing a new phone number for Ford,

which he called and texted. Whether intentional or not, the new phone number was incorrect, and the prosecutor's e-mail to Ford informing her of the wrong number did not receive a response. Once the investigator became involved in the search for Ford, he went to her apartment seven times over a four-day period and called her. He confirmed that Ford still lived at the address by speaking with the building manager and observing a notice addressed to Ford on the door. He made inquiries with the sheriff's department and the coroner.

The issue before us is whether the prosecution "show[ed] that its efforts to locate and produce [Ford] for trial were reasonable under the circumstances presented. [Citations.]" (*Herrera*, *supra*, 49 Cal.4th at p. 623.) We conclude that the prosecution met its burden.

Defendant points to the investigator's failure to search social media, make inquiries with other government agencies or nearby hospitals, or talk to Daniels or to Ford's neighbors. "Additional measures can always be suggested. 'But these suggestions do "not change our conclusion that the prosecution exercised reasonable diligence. 'That additional efforts might have been made or other lines of inquiry pursued does not affect this conclusion. [Citation.] It is enough that the People used reasonable efforts to locate the witness."' [Citation.]" (*Sánchez*, *supra*, 63 Cal.4th at p. 448.)[7] Thus, once the threshold showing of reasonableness has been made, as was made here, the mere existence of additional efforts that could have been used does not disturb the due-diligence finding.

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[7] For this reason, the trial court ultimately concluded that the fact that the investigator did not go to Ford's apartment during the evening did not affect its finding of due diligence.

Defendant also argues that the trial court should not have considered the prosecutor's unsworn statements regarding his efforts to contact Ford and that the prosecution should have continued to search for Ford after the court ruled that she was unavailable.[8] We find these contentions meritless.

First, the trial court could properly exercise its discretion to consider the prosecutor's representations—without requiring him to testify formally—to determine whether due diligence had been exercised. In *People v. Smith* (2003) 30 Cal.4th 581 (*Smith*), the Supreme Court concluded that "[t]he prosecution met its burden of showing due diligence" (*id.* at p. 611) in part based on the

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[8] Defendant also contends that he "did not have the same interest and motive" when he cross-examined Ford at the preliminary hearing because it was for case number YA095110. Case number YA095110, which charged defendant with six counts of attempting to dissuade a witness (§ 136.1, subd. (a)(2)), was consolidated on January 9, 2017, into case number YA094029, which had originally charged defendant with corporal injury (§ 273.5, subd. (f)(2)), criminal threats (§ 422, subd. (a)), and dissuading a witness (§ 136.1, subd. (b)(1)). But defendant fails to present cogent legal authority or argument concerning this contention, and we therefore consider it forfeited. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793 [a court may treat as waived a point in a brief made without reasoned argument or authority].) But even if we were to consider this argument, we would reject it because "[f]or the preliminary hearing testimony of an unavailable witness to be admissible at trial under Evidence Code section 1291," the motive for cross-examining the witness "need not be identical, only 'similar[]'" to what it would be at trial. (*People v. Zapien* (1993) 4 Cal.4th 929, 975.) Reviewing the record before us, we conclude that defendant did have a sufficiently similar motive.

prosecutor's "representation as an officer of the court" where the trial court did not "require[] him to testify formally" (*id.* at p. 608). Although such "information may have been legally incompetent" for other purposes, "it sufficed to show that the prosecution made reasonable efforts to locate" a missing witness. (*Id.* at p. 611.) We find no error here in considering the prosecutor's representations for this purpose[9] given that "attorneys are officers of the court, and '"when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath."' [Citation.]" (*Holloway v. Arkansas* (1978) 435 U.S. 475, 486; see also *People v. Laudermilk* (1967) 67 Cal.2d 272, 286 [regarding "statements of a responsible officer of the court as tantamount to sworn testimony" where defense counsel was "describing and representing to the court his own personal experiences with and observations of his client"].)

Second, we reject defendant's contention that the prosecution had a duty to continue searching for Ford even after the trial court ruled that she was unavailable. The cases cited by defendant are readily distinguishable and do not stand for such a proposition. For example, in *Burns v. Clusen* (7th Cir. 1986) 798 F.2d 931, the Seventh Circuit Court of Appeals held that it was error to find based "on a confused and 'stale' record" that a

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[9] Defendant's reliance on *In re Zeth S.* (2003) 31 Cal.4th 396, 413–414, fn. 11 for the proposition that "[i]t is axiomatic that the unsworn statements of counsel are not evidence" is misplaced. *In re Zeth S.* is inapposite because, in that case, counsel's unsworn statements in a letter brief were proffered as "evidence" of another person's feelings and preferences regarding the outcome of a dependency proceeding in order to prove changed circumstances. (*Ibid.*)

witness was unavailable because of a mental disability. (*Id.* at p. 943.) The court explained that, "[i]f a prosecutor secures an early ruling of unavailability, and there is a delay until the start of trial so as to make the earlier information 'stale,' the obligation remains upon the prosecutor to offer current information proving that the status of the witness' illness has not changed." (*Ibid.*) Here, the court ruled that Ford was unavailable because she could not be located on August 18, 2017, and her preliminary hearing testimony was read to the jury just five days later on August 23, 2017. We find no error.

Ford's preliminary hearing testimony was properly admitted based on her unavailability.

II. Substantial Evidence Supports Defendant's Corporal Injury Conviction.

Defendant contends his conviction for corporal injury under section 273.5 (count 1) must be reversed because there is insufficient evidence that he was in a dating relationship with Ford. We conclude otherwise.

"'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] In so doing, a reviewing court 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.]" (*People v. Powell* (2018) 5 Cal.5th 921, 944.)

Under section 273.5, subdivisions (a) and (b)(3), an offender is guilty of a felony if he or she "willfully inflicts corporal injury

resulting in a traumatic condition upon" a person "with whom the offender has, or previously had, a[] . . . dating relationship[.]" A "dating relationship" is defined for this purpose as "frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement independent of financial considerations." (§§ 243, subd. (f)(10), 273.5, subd. (b)(3).)

This "'definition of a dating relationship . . . does not require "serious courtship," an "increasingly exclusive interest," "shared expectation of growth," or that the relationship endures for a length of time. [Citation.] The statutory definition requires "frequent, intimate associations," a definition that does not preclude a relatively new dating relationship. . . .' [Citation.]" (*People v. Upsher* (2007) 155 Cal.App.4th 1311, 1322–1323 (*Upsher*).) However, "a '"dating relationship" does not include "a casual relationship or an ordinary fraternization between [two] individuals in a business or social context" . . . .' [Citation.]" (*Id.* at p. 1323.)

Substantial evidence supports the jury's finding that Ford and defendant either had or were in a dating relationship within the meaning of the statute. Ford testified that defendant was her ex-boyfriend, who she had dated for a few months. On the night of the incident, Ford told Deputy Patino that defendant was her boyfriend and that they had been dating for three months. Ford also told defendant's private investigator that she had dated defendant for a few months. On the 911 call, Daniels described "domestic violence[,]" involving "[a] boyfriend." And, although defendant denied having a dating relationship with Ford, he testified that he saw her about seven or eight times between December 2015 and February 2016 when he would come to town from Las Vegas.

From this evidence a reasonable juror could find beyond a reasonable doubt that defendant was "not merely [in] a casual social relationship" (*Upsher*, *supra*, 155 Cal.App.4th at p. 1323) with Ford but rather shared "frequent, intimate associations" (§ 243, subd. (f)(10)) sufficient to constitute a dating relationship. We therefore affirm defendant's conviction on count 1.

III. Substantial Evidence Supports the True Finding on Defendant's Prior Conviction for Voluntary Manslaughter.

The trial court found true the allegation that defendant suffered a prior conviction in 1998 for voluntary manslaughter (§ 192, subd. (a)). Defendant argues that the true finding must be reversed because it was based on an unsigned, uncertified abstract of judgment. We disagree.

"[A] defendant's statutory right to a . . . trial on prior conviction allegations (§ 1025) . . . include[s] various procedural guaranties: the prosecution must prove the prior conviction allegation beyond a reasonable doubt, the defendant enjoys the privilege against self-incrimination and the right to confront and cross-examine witnesses against him, and the rules of evidence apply. [Citation.]" (*People v. Henley* (1999) 72 Cal.App.4th 555, 564.) Under section 969b, the prosecution can meet its burden of proving a prior conviction by introducing certified copies of prison records.[10] (*People v. Brucker* (1983) 148 Cal.App.3d 230, 241

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[10] Section 969b provides that "[f]or the purpose of establishing prima facie evidence of the fact that a person being tried for a crime or public offense under the laws of this State has been convicted of an act punishable by imprisonment . . . and has served a term therefor in any penal institution, . . . the records or copies of records of any state penitentiary . . . in which such person has been imprisoned, when such records or copies thereof

(*Brucker*).) "[S]ection 969b is essentially 'a hearsay exception' that allows certified copies of the specified records 'to be used for the truth of the matter asserted in those records,' i.e., that a person served a prison term for a prior conviction. [Citation.]" (*People v. Martinez* (2000) 22 Cal.4th 106, 116 (*Martinez*).)

Here, the "evidence offered pursuant to section 969b, commonly referred to as a '969b packet'" (*People v. Moreno* (2011) 192 Cal.App.4th 692, 707), included a chronological log of defendant's movement history within the Department of Corrections and Rehabilitation, abstracts of judgment, fingerprint cards, and a photograph of defendant. The cover page of the 969b packet was a signed letter from a correctional case records analyst "certify[ing] that the Director of the Department of Corrections[] is the official legal custodian of the records of prisoners committed to the California State Prisons" and had "authorized [the analyst] to certify . . . the criminal records of persons who have served sentences in California State Prisons." The analyst further certified that the accompanying documents were "a true and correct copy of the original(s) in [her] custody . . . ." Among the documents in the 969b packet was an abstract of judgment for case number CR60589 out of Riverside County indicating that defendant was convicted of voluntary manslaughter on April 8, 1998, and received an eight-year sentence. Although bearing the stamp of the Riverside County Superior Court, the abstract of judgment was not signed by the clerk.

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have been certified by the official custodian of such records, may be introduced as such evidence."

Defendant argues that the unsigned, uncertified abstract of judgment does not constitute proper, admissible evidence that he suffered the voluntary manslaughter conviction. He asserts that "[a]n official record of conviction certified in accordance with subdivision (a) of [Evidence Code] section 1530"[11] (Evid. Code, § 452.5, subd. (b)(1)) is the exclusive means of proving a prior conviction. Not so. While, "under [Evidence Code] sections 1530 and 452.5, subdivision (b), a properly certified copy of an official court record is a self-authenticated document that is presumptively reliable, and standing alone may be sufficient to prove a prior felony conviction" (*People v. Skiles* (2011) 51 Cal.4th 1178, 1186), these statutes do not limit the means of proving a prior conviction to this method alone (see *id.* at pp. 1186–1187). Section 969b explicitly provides that certified prison records constitute prima facie evidence of a prior conviction. And, "provided it satisfies applicable rules of admissibility," "evidence other than the record of conviction and certified prison records under section 969b is admissible" for this purpose as well. (*Martinez*, *supra*, 22 Cal.4th at p. 116.)

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[11] Evidence Code section 1530, subdivisions (a)(1) and (2), provides in relevant part that "[a] purported copy of a writing in the custody of a public entity . . . is prima facie evidence of the existence and content of such writing or entry if: [¶] . . . [t]he copy purports to be published by the authority of the . . . public entity . . . in which the writing is kept; [or] [¶] . . . [t]he office in which the writing is kept is within the United States . . . and the copy is attested or certified as a correct copy of the writing . . . by a public employee, or a deputy of a public employee, having the legal custody of the writing[.]"

As defendant acknowledges, "[s]ection 969b does not require that each separate prison document be individually certified." (*Brucker*, *supra*, 148 Cal.App.3d at p. 241.) Rather, a single certification applicable to all prison documents in a 969b packet is sufficient. (*Id.* at pp. 240–241.) Defendant argues, however, that such a rule does not apply "if a particular record in the packet is itself required to be certified such as an abstract of judgment[.]" Defendant's reliance on *People v. Matthews* (1991) 229 Cal.App.3d 930 (*Matthews*) for this proposition is misplaced. *Matthews* considered the admissibility of uncertified computer printouts of "rap sheets" to prove a prior conviction. Not only did the computer-generated lists themselves "lack any certification," but they were also "not included within materials otherwise certified." (*Id.* at p. 938.) The Court of Appeal concluded that, without a proper foundation, the records were inadmissible under either the business records exception or official records exception to the hearsay rule. (*Id.* at p. 940 & fn. 6.) *Matthews* did not consider the admissibility of an abstract of judgment maintained as a prison record and included as part of a certified 969b packet—that is, "included within materials otherwise certified" (*id.* at p. 938).[12]

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[12] We also question the extent to which *Matthews*, *supra*, 229 Cal.App.3d 930 is still good law. (See *Martinez*, *supra*, 22 Cal.4th at p. 116 [agreeing with *People v. Dunlap* (1993) 18 Cal.App.4th 1468 (*Dunlap*)—and impliedly rejecting *Matthews*'s contrary dictum—that the fact of a prior conviction may be proven by evidence other than the record of conviction or certified prison records]; *Dunlap*, *supra,* at pp. 1473–1476 [disagreeing with and casting doubt on the legal reasoning of *Matthews*].)

The abstract of judgment at issue here was unsigned, but it bore the stamp of the superior court, as well as a stamp indicating that it was filed in the superior court. And, it was introduced as part of a properly certified 969b packet. The abstract—a "statutorily sanctioned, officially prepared clerical *record* of the conviction and sentence" that "may serve as the order committing the defendant to prison" (*People v. Delgado* (2008) 43 Cal.4th 1059, 1070)— was properly admitted and considered by the trial court to find true defendant's prior voluntary manslaughter conviction. (See *id.* at pp. 1064, 1070–1071 [affirming true finding of prior conviction based on abstract of judgment included in a 969b packet].)

Nor do we discern a risk of injustice in this case. Defendant does not argue or point to anything in the record suggesting that the abstract of judgment was not, in fact, an accurate record of the fact of his conviction. Moreover, defendant himself submitted a copy of the same unsigned abstract of judgment, as well as his executed plea agreement in which he agreed to plead guilty to voluntary manslaughter in case number CR60589, as an exhibit to his motion to strike his prior convictions.

Substantial evidence thus supported the trial court's finding of defendant's prior voluntary manslaughter conviction.

IV. The Matter Must Be Remanded for the Trial Court to Exercise Its Discretion Whether to Strike Defendant's Serious Felony Enhancements Pursuant to SB 1393.

While this appeal was pending, SB 1393, effective January 1, 2019, amended section 667, subdivision (a), and section 1385, subdivision (b), to give trial courts discretion to strike the imposition of a five-year sentencing enhancement for a

prior serious felony conviction. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).) SB 1393 applies retroactively to nonfinal judgments of conviction where a serious felony enhancement was imposed at sentencing. (*Id.* at pp. 971–972.) Remand is required to allow a court to exercise its new discretion "unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so. [Citation.]" (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110; see also *Garcia*, *supra*, at p. 973, fn. 3.)

We agree with the parties that the trial court did not clearly indicate whether it would strike the serious felony enhancements if it had discretion to do so. Therefore, the matter must be remanded for the trial court to consider striking one or both of defendant's previously mandatory five-year enhancements imposed under section 667, subdivision (a)(1).

V. Upon Resentencing, the Trial Court Must Prepare an Amended Abstract of Judgment.

The People correctly note that the abstract of judgment only reflects the imposition of one five-year enhancement under section 667, subdivision (a)(1), which conflicts with the oral pronouncement of judgment and the minute order. The oral pronouncement of judgment controls when it differs from the abstract of judgment. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Accordingly, after the trial court determines whether to strike one or both serious felony enhancements, it shall prepare an amended abstract of judgment that accurately reflects defendant's sentence.

DISPOSITION

The matter is remanded for resentencing pursuant to section 667, subdivision (a), and section 1385, subdivision (b), as amended by SB 1393. Upon resentencing, the trial court is directed to prepare an amended abstract of judgment and forward a certified copy of it to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT